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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CLYDE EARL JOHNSON,

Defendant and Appellant.

D072928

(Super. Ct. No. SCD270231)

APPEAL from a judgment of the Superior Court of San Diego County, Albert T. Harutunian III and Kathleen M. Lewis, Judges. Affirmed.

Marianne Harguindeguy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Andrew S. Mestman and Joseph C. Anagnos, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Clyde Johnson pleaded guilty to one count of simple possession of methamphetamine, and a jury found him guilty of one count of possession of methamphetamine for sale. He admitted certain enhancement allegations, and the trial court sentenced him to a six-year split sentence. On appeal, Johnson contends the trial court erred by denying his motion to represent himself under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). He also contends the trial court erred by admitting for impeachment purposes a 2004 conviction for possession of methamphetamine for sale. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The People charged Johnson with one count of possession of methamphetamine for sale (Health & Saf. Code,¹ § 11378) and one count of simple possession of methamphetamine (§ 11377, subd. (a)). The People further alleged Johnson had suffered prior convictions for possession of methamphetamine for sale (§ 11378) and transportation of methamphetamine for sale (§ 11379), and that he had served three prior prison terms (Pen. Code, §§ 667.5, subd. (b), 668). Johnson pleaded guilty to simple possession, and went to trial on the possession-for-sale charge.

Prosecution Case

At about 8:00 a.m. on July 4, 2016, San Diego Police Officers Michael Mobley and Jonathan McCarthy observed Johnson sleeping in a car (a municipal code violation)

¹ Further statutory references are to the Health and Safety Code unless otherwise indicated.

with expired registration near a known "narcotic house" in Mira Mesa. Mobley knocked on the driver side window, while McCarthy covered him from the passenger side. Johnson woke up and partially opened the driver's door.

Through the open door, Officer Mobley observed a large bag of methamphetamine between the driver's seat and the doorjamb rail. From the passenger side, Officer McCarthy observed another bag of methamphetamine on top of the center console. Johnson did not exhibit signs of being under the influence of methamphetamine.

Officer Mobley asked Johnson about his association with the car. Johnson said he had borrowed it from a friend named Christie in Riverside about four days earlier. Mobley saw the keys were in the ignition.

As Officer Mobley obtained Johnson's "basic information," Johnson removed his jacket (purportedly to find his identification) and repeatedly tried to place it over the bag of methamphetamine on the center console. During this process, Mobley observed an additional bag of methamphetamine on the floorboard near Johnson's feet. When Mobley asked what it was, Johnson responded, " 'It looks like drugs.' " Johnson did not seem surprised.

The officers had Johnson exit the car, and McCarthy searched him. In Johnson's pockets, McCarthy found a plastic container with three baggies of methamphetamine (two of which bore a Walgreen's logo), a glass pipe, and \$69 in cash. The officers handcuffed Johnson and placed him in the patrol car.

The officers searched Johnson's car and found the following items: eight baggies of methamphetamine; a digital scale with methamphetamine residue; chunks of loose

methamphetamine next to the scale; prepackaged bags of marijuana; a larger bag of marijuana; a bag with more than 40 baggies bearing the same Walgreen's logo as the baggies of methamphetamine recovered from Johnson's pocket; and eight or nine cellphones. The officers seized a total of about three ounces of methamphetamine. Johnson admitted that two laptops in the trunk of the car belonged to him.

A detective trained in controlled substances opined at trial that a defendant in a hypothetical scenario mirroring the facts of this case would possess the methamphetamine with the intent to sell it. The detective explained that a usable dose of methamphetamine is approximately one-tenth of one gram, or 0.0035 ounces (thus, the three ounces seized in the car yield about 857 doses). Indicia of drug sales include quantity, packaging, a scale, and presence of cellphones.

The parties stipulated Johnson suffered a conviction in 2014 for possession of methamphetamine for sale. Under Evidence Code section 1101, subdivision (b), one of the officers involved in the 2014 arrest testified about the underlying facts of that case to show Johnson's knowledge and intent in the current case.² During a probation-related search, police discovered on Johnson's person a methamphetamine pipe, blue

² Although evidence of other crimes is generally inadmissible under Evidence Code section 1101, subdivision (a) to show criminal propensity, such evidence may be admissible under subdivision (b) of the statute if relevant to prove intent or knowledge. (See *People v. Jones* (2011) 51 Cal.4th 346, 371; Evid. Code, § 1101, subd. (b) ["Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as . . . intent [or] . . . knowledge . . .) other than his or her disposition to commit such an act."].)

methamphetamine wrapped in Saran wrap, and a container of marijuana. In the trunk of Johnson's car, the officers found several large baggies of methamphetamine, "a large amount of small plastic baggies" with a CVS logo, two digital scales with residue, methamphetamine pipes, and a cellphone with messages asking for "green" and "blue" ("narcotics lingo" for marijuana and blue methamphetamine). Police impounded nearly one ounce (about 285 doses) of methamphetamine during this arrest.

Defense Case

Johnson was the sole defense witness. He testified that the night before his arrest, he and his coworkers at a party rental company worked through the night setting up stages for major events. They used methamphetamine before their work shift, and Johnson bought three baggies of methamphetamine from them for his personal use. One of the coworkers dropped Johnson off at home around 5:20 a.m.

When Johnson realized he did not have his house keys, he decided to sleep in a car he had seen parked down the street for a few days. He explained he did not knock on the door to his house—which he admitted was the known narcotic house Officer Mobley testified about—because he did not want to disturb his roommate, who was a "heavily medicated . . . senior citizen." Johnson said he felt comfortable sleeping in the car because he had seen some neighbors, whom he knew to be "mobile mechanics," working on the car, and he did not think they would mind. He explained his laptops were in the trunk because he had loaned them to the mechanics.

Johnson insisted he had never driven the car and did not know the owner. He did not recall telling the officers he had been *driving* the car for several days; rather he

surmised they had misunderstood him—when he told them, "I've had the car for four days," he meant, "it's been parked in front of my house for four days." He acknowledged he told Officer Mobley he had borrowed the car from "Christie in Riverside," but explained he said that because he was disoriented and had heard the mechanics say "it belonged to some female," and Johnson "just attached the name Christie."

Johnson claimed he only learned of the methamphetamine in the car when the officers woke him up. He claimed it was a coincidence that the baggies of methamphetamine in his pocket bore the same Walgreen's logo as the baggies in the car.

Johnson was impeached with several prior felony convictions, which we discuss in part II.A., *post*.

Prosecution Rebuttal Case

Officer Mobley testified in rebuttal. He said he had previously seen Johnson driving the car in the Mira Mesa area. Mobley also testified he was familiar with the mobile mechanics Johnson mentioned and knew they lived in another known narcotic house in the area. In fact, Mobley had encountered Johnson at that house about one week before his arrest, at which time Johnson told Mobley the mechanics were fixing his transmission in the car in question.

Jury Verdict and Sentencing

After deliberating for about one hour, the jury found Johnson guilty of possession of methamphetamine for sale. Johnson admitted all of the enhancement allegations. The trial court imposed a six-year split sentence, with four years to be served in county jail, followed by two years of mandatory supervision. The court explained that in selecting

the upper term on the possession-for-sale conviction, the court found Johnson "did commit perjury at the time of his testimony in court" and that his "testimony was not credible at all in the least."³

DISCUSSION

I. *Denial of Faretta Motion*

On the day trial was set to begin, Johnson moved under *Faretta* to represent himself. The trial court denied the motion as untimely, finding it was motivated more by a desire for delay than for self-representation. Johnson contends this violated his Sixth Amendment right to self-representation. We disagree.

A. *Background*

At the April 14, 2017 trial call, Johnson's appointed counsel told the court Johnson "is requesting additional time as he would like to hire counsel." (Capitalization omitted.) The court denied Johnson's continuance request, but trailed the matter for five days to accommodate the prosecutor's calendar.

On April 19, the presiding department called the matter for trial. The prosecutor and appointed defense counsel answered ready, but defense counsel informed the court that Johnson was "request[ing] to continue the matter so he can retain private counsel."

³ The court made this finding under rule 4.408(a) of the California Rules of Court, which states: "The listing of factors in these rules for making discretionary sentencing decisions is not exhaustive and does not prohibit a trial judge from using additional criteria reasonably related to the decision being made. Any such additional criteria must be stated on the record by the sentencing judge."

The presiding judge denied the continuance request as untimely and assigned the case to Department 59 (Judge Harutunian) for trial.

Once in Department 59, the court noted it had received a *Faretta* waiver form indicating Johnson was seeking to represent himself. The court held an in camera session with Johnson and his appointed counsel.⁴ When the court asked Johnson why he had waited so long to make his request, Johnson responded that he had requested "the same thing" two hearings ago, but then clarified that his previous request was actually for "a continuance so that [he] could seek private counsel" because he "wanted to get another examination, an opinion of this thing here." The court asked, "[I]s it accurate to say that you're asking to represent yourself not because you want to represent yourself but because you are not being given an opportunity to consult with a private attorney, and, therefore, in the absence of that, you feel that you have no choice but to represent yourself?" Johnson responded, "I'd say about . . . 80 percent accurate." He explained his request was also motivated by his perception that appointed counsel was not doing "a thorough job," and the fact the prosecutor had just delivered new discovery advising that

⁴ We granted Johnson's motion to augment the record to include the reporter's transcript of the in camera proceeding. The trial court transmitted two volumes of sealed reporter's transcripts. Johnson subsequently requested that we strike Volume II of the augmented reporter's transcript because it "does not contain a hearing involving [Johnson] and is not the one [his counsel] requested." We deferred ruling on the request to consider it concurrently with the appeal. Having now considered the matter, we agree Volume II of the augmented reporter's transcript does not relate to the issues in this appeal. Accordingly, we grant Johnson's request to strike it.

the quantity of seized methamphetamine was substantially more than initially indicated. Johnson estimated he would need "a minimum of two weeks" to prepare for trial.

The trial court denied Johnson's *Faretta* motion on the grounds it was untimely and appeared to be motivated by a desire for delay rather than for self-representation:

"What I see before me is a last-second request to represent yourself when it's clear—and I think you've really kind of admitted it—it's not really motivated by a desire to represent yourself. It's motivated by a reaction to not being permitted to have more time to talk with a private attorney about either getting a second opinion or even potentially seeking additional representation. And it's also being raised at a time when you have said that you would need several weeks to get ready to represent yourself. And so that would result in a complete rescheduling of the trial.

"And there was a request to continue the trial already made this morning in the presiding department, which was denied as untimely. So it doesn't suddenly become timely when you move to a different floor in the courthouse."

Back in open session, the court indicated it had denied Johnson's *Faretta* motion. Defense counsel then, "*for a completely separate reason*," asked the court for a continuance. (Italics added.) Counsel explained that since leaving the presiding department in the morning, the prosecution provided documentation regarding new lab results on the methamphetamine. The documents had "dates that are changed, initials that are changed," and "all sorts of . . . scratch marks all over," which counsel wanted to investigate before trial. As an additional ground, defense counsel stated the prosecutor still had not provided the underlying files regarding Johnson's prior convictions, which the prosecutor sought to admit to show Johnson's knowledge and intent regarding methamphetamine sales.

The prosecutor explained the new lab documents were the product of consolidating lab work that had previously been performed at different times by different lab analysts so that a single analyst could testify at trial. The prosecutor stated he believed he had already provided the materials on Johnson's priors, but would follow up to be sure. In light of this, the prosecutor was willing to submit on the defense request for a continuance. The prosecutor then asked the court if it wished to view the new lab documents, which prompted the following colloquy regarding the potential impact of a continuance on Johnson's representation status:

"[PROSECUTOR]: . . . Do you want to see the lab [reports] that he's talking about?

"THE COURT: No.

"[PROSECUTOR]: Okay.

"THE COURT: It's not a matter for me to have an opinion about it. It's—I guess what I need to know is if, for the reasons, or some or all of the reasons, indicated by [defense counsel]—if the Court were to find that there actually is good cause to continue the trial date, is Mr. Johnson . . . still requesting that he go represent himself?

"THE DEFENDANT: No.

"THE COURT: Okay. So you wouldn't be renewing your request to represent yourself in that if that occurred?

"THE DEFENDANT: No, sir."

The court thereafter granted the defense request for a continuance, clarifying it was granted "as a result of some new discovery that was received by the defense this morning after the request to continue in Presiding had occurred." The court continued trial to June 20.

After one additional continuance at the request of each side, trial commenced on August 14. Johnson never again sought to invoke his *Faretta* rights.

B. *Relevant Legal Principles*

"In *Faretta, supra*, 422 U.S. 806, the United States Supreme Court held that the Sixth Amendment to the United States Constitution gives criminal defendants the right to represent themselves." (*People v. Buenrostro* (2018) 6 Cal.5th 367, 425 (*Buenrostro*).) "A trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial." (*People v. Welch* (1999) 20 Cal.4th 701, 729.) When these criteria are satisfied, denial of a *Faretta* motion is reversible per se. (*Welch*, at p. 729.)

However, "[w]hen a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1365.) " '[T]imeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made. An analysis based on these considerations is in accord with the purpose of the timeliness requirement, which is "to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice." ' ' ' (*Buenrostro, supra*, 6 Cal.5th at p. 426.)

In considering whether to grant an untimely *Faretta* motion, "the trial court should consider, among other factors, 'the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.' " (*Buenrostro, supra*, 6 Cal.5th at p. 426.)

C. Analysis

We find no error in the trial court's denial of Johnson's *Faretta* motion.

As a preliminary matter, Johnson contends his motion was timely such that denial constituted per se reversible error. We disagree. The trial court acted well within its discretion in concluding Johnson's motion was untimely and motivated more by a desire for delay than for self-representation. Johnson had unsuccessfully requested a continuance on April 14. He again unsuccessfully requested a continuance on April 19—the day set for trial—which the presiding judge denied as untimely. It was only after the presiding judge assigned the case to a department for trial that Johnson *for the first time* sought to represent himself. Even then, Johnson acknowledged his request was motivated in part to retain counsel to provide additional analysis on his case. The trial court's finding in this regard is further supported by the fact Johnson later told the court he would not renew his *Faretta* motion if the court granted his counsel's request for a continuance. The trial court therefore acted within its discretion in denying Johnson's untimely *Faretta* motion.

Johnson argues the trial court abused its discretion because, although it purported to be concerned about delay when ruling on the *Faretta* motion, the court nonetheless granted defense counsel's subsequent request for a continuance. We are not persuaded. Whereas Johnson argued he would need a continuance to address new lab results that showed he possessed more methamphetamine than previously indicated, his defense counsel requested a continuance "*for a completely separate reason*"—to investigate the cryptic markings on the lab results and to obtain and review the records regarding Johnson's prior convictions. (Italics added.) The trial court did not abuse its discretion by treating these admittedly different requests differently.

Johnson also argues the trial court acted improperly by telling him it " 'need[ed] to know' " whether he would renew his *Faretta* motion if the court were to grant defense counsel's request for a continuance, thereby "imply[ing] that renewing the motion would be weighed against [him]." We see nothing improper in the court's statement. First, it appears the court's "need to know" comment was in contrast to its statement immediately prior that it did not need to see the handwritten remarks on the new lab reports. Second, in any event, the comment merely reflected the trial court's proper concern with maintaining an orderly trial calendar.

Because we find no abuse of discretion in the trial court's denial of Johnson's untimely *Faretta* motion, we need not address the Attorney General's contention that Johnson waived the issue on appeal by stating he would not renew his *Faretta* motion if the court granted defense counsel's request for a continuance.

II. Admission of Johnson's 2004 Conviction for Impeachment

Johnson contends the trial court erred by admitting for impeachment purposes a 2004 conviction for possession of methamphetamine for sale. Johnson contends the conviction is too remote in time and unduly prejudicial. We disagree.

A. Background

The prosecution moved in limine to admit several of Johnson's prior convictions for impeachment if he were to testify. Specifically, the prosecutor sought to admit (1) 2004 convictions for transportation of methamphetamine for sale (with a firearm use enhancement), receiving stolen property (two counts, each with a firearm-use enhancement), and reckless evasion; (2) a 2009 conviction for receiving stolen property; (3) a 2011 conviction for burglary; and (4) a 2014 conviction for possession of methamphetamine for sale (discussed in our factual summary). The prosecution also sought to introduce the underlying facts of the 2014 conviction under Evidence Code section 1101, subdivision (b) to show Johnson's intent to sell the methamphetamine in the current case.

Johnson moved in limine to exclude his priors, both as impeachment evidence and under Evidence Code section 1101, subdivision (b). He argued the convictions were unduly prejudicial, and that the 2004 conviction for possession of methamphetamine was particularly remote in time and too similar to the current offense.

The trial court found the 2014 conviction admissible under Evidence Code section 1101, subdivision (b) to prove Johnson's knowledge and intent in the current case.⁵ The court also found the specified prior convictions (but not their underlying facts) admissible for impeachment purposes because they constitute crimes of moral turpitude and occurred over an uninterrupted period of criminality. The court agreed to sanitize the 2004 conviction by excluding the firearm-use enhancements and receiving-stolen-property conviction (i.e., only the transportation-for-sale and reckless-evasion convictions were admissible). The court also indicated it "would give some type of propensity instruction that [the 2004 possession conviction is] not to be considered for propensity."

Johnson testified at trial and was impeached with his 2004, 2009, 2011, and 2014 convictions.⁶ Johnson never requested a limiting instruction, and the court never gave one. However, the court did instruct the jury as follows: "If you find that a witness has been convicted of a felony, you may consider that fact in evaluating the credibility of the witness's testimony"; and, "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." (See CALCRIM Nos. 303 ["Limited Purpose Evidence in General"], 316 ["Additional

⁵ Johnson does not challenge this ruling on appeal.

⁶ The prosecutor also impeached Johnson with additional, pre-2004 felony convictions after Johnson testified his legal troubles began in 2004. Johnson did not object to this impeachment at trial, and he does not challenge it on appeal.

Instructions on Witness Credibility—Other Conduct"].) Likely referring to these instructions, the prosecutor argued during closing, "One of the jury instructions that you get tells you that you can consider people's prior criminal history for the limited purpose of determining their credibility."

B. *Relevant Legal Principles*

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352."⁷ (*People v. Clark* (2011) 52 Cal.4th 856, 931 (*Clark*).) " '[T]he admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad.' " (*Clark*, at p. 931.)

"When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify." (*Clark, supra*, 52 Cal.5th at p. 931.) "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to

⁷ Evidence Code section 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion [citations]." (*Id.* at p. 932.)

C. Analysis

We conclude the trial court acted within its broad discretion in admitting Johnson's 2004 possession-for-sale conviction for impeachment purposes. The parties agree the crime is one of moral turpitude. (See *People v. Harris* (2005) 37 Cal.4th 310, 337 ["Possession of drugs for sale, which involves the intent to corrupt others, is conduct involving moral turpitude."]; *People v. Anderson* (2018) 5 Cal.5th 372, 408 (*Anderson*) ["Any '[m]isconduct involving moral turpitude may suggest a willingness to lie . . . '"].) Thus, evidence regarding Johnson's credibility was highly probative because the central issue at trial was the credibility of his claims that he neither possessed the drugs in the car nor intended to sell them.

The trial court did not abuse its discretion in concluding the evidence's probative value was not substantially outweighed by the risk of undue prejudice. First, although the 2004 conviction was somewhat remote in time, " '[e]ven a fairly remote prior conviction is admissible if the defendant has not led a legally blameless life since the time of the remote prior.' " (*Anderson, supra*, 5 Cal.5th at p. 408.) Johnson's convictions in 2009, 2011, and 2014 show he had not lived a legally blameless life since 2004.

Second, although there is some risk of prejudice arising from the fact the 2004 conviction was for the same offense as the current case, this "similarity . . . is not dispositive." (*Clark, supra*, 52 Cal.4th at p. 932.) To the contrary, evidence of repetitive

criminal conduct "may be more probative of credibility than a single crime." (*Id.* at p. 932.) Moreover, because the jury heard the *details* underlying Johnson's 2014 conviction for possession of methamphetamine for sale, it is unlikely that admission of the *fact* of his 2004 conviction (with no underlying details) would inflame the jury. In addition, the court sanitized the 2004 conviction by excluding the more inflammatory firearm-use enhancement.

Finally, the fact the trial court found the 2004 conviction admissible did not dissuade Johnson from exercising his constitutional right to testify in his own defense. (See *Clark, supra*, 52 Cal.4th at p. 931 ["the court should consider . . . what effect its admission would have on the defendant's decision to testify"].)

Johnson complains that the trial court failed to give the jury a limiting instruction against using the 2004 conviction as propensity evidence. However, the court instructed the jury generally regarding the use of felony convictions in evaluating credibility and about the limited admissibility of evidence. The prosecutor coupled these instructions by telling the jury that the instructions will "tell[] you that you can consider people's prior criminal history for the limited purpose of determining their credibility." If Johnson "believed the jury needed additional guidance, it was incumbent on him to request" an appropriate limiting instruction. (*Clark, supra*, 52 Cal.4th at p. 934.) He did not do so.

DISPOSITION

Affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

GUERRERO, J.